



Association of Bay Area Governments

**ABAG PLAN CORPORATION**  
**101 Eighth Street**  
**Oakland, CA 94607-4707**

**MEMO**

**Date:** June 30, 2016  
**To:** PLAN Claims Committee Members  
**From:** Jill Stallman, ABAG PLAN Claims Manager  
**Re:** ABAG PLAN Defense Counsel Appointment  
Campbell Warburton Law Firm - Robert (Bob) Gundert

**Recommendation**

After meeting with and interviewing this prospective defense attorney, staff recommends that the Claims Committee approve the appointment of Campbell Warburton Law Firm – San Jose, CA (Bob Gundert) to ABAG PLAN’s defense counsel panel.

**Overview**

Campbell Warburton Law Firm (Bob Gundert) is being recommended as a new appointment to the ABAG PLAN defense counsel panel. Bob Gundert has many years of experience successfully defending public entities in Southern California. After moving back to the Bay Area, where he grew up and went to school, Bob would like to continue working with municipalities and their unique risks. He has previously worked with one of our members (Los Gatos - City Attorney Rob Schultz) while in San Louis Obispo and comes highly recommended. Bob has also provided a written recommendation from the City of Santa Maria, CA. With his location in the South Bay area, his appointment helps fill a gap to better service our members in the South Bay. Please review attachments for additional information regarding his qualifications.

**Summary**

The Claims Committee, upon request by ABAG or a Member Entity, may hear or make recommendations with respect to adding or deleting law firms or attorneys from our defense counsel panel. The Claims Committee is being called upon to review the qualifications, firm bio and other background information on Campbell Warburton Law Firm (Bob Gundert) provided with the goal of appointing him and his firm to our defense counsel panel.

In addition to Mr. Gundert’s background in general liability (dangerous conditions), he has demonstrated experience with law enforcement liability claims (police, excessive force, civil rights violations) and land use matters (inverse condemnation). He has good experience in appeals, as well. His rates (\$180/hr Partner, Associate – N/A, \$90/hr Paralegal) are in line with the currently negotiated rates of our other defense panel counsel.

Staff recommends that we add Campbell Warburton Law Firm (Bob Gundert) to the defense panel.



**TOWN OF LOS GATOS**  
**OFFICE OF THE TOWN ATTORNEY**  
**PHONE (408) 354-6880**  
**FAX (408) 354-8431**

CIVIC CENTER  
110 E. MAIN STREET  
LOS GATOS, CA 95030

June 9, 2016

VIA EMAIL

Jill Stallman  
375 Beale Street  
Suite 700  
San Francisco, CA 94105

Dear Jill:

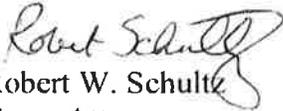
Pursuant to our conversation, I would like to recommend Robert Gundert as candidate for ABAG's Defense Counsel List.

I have known Robert Gundert for approximately 19 years in both a professional and personal capacity. During that time Bob has exhibited a high degree of professionalism and integrity. Bob certainly has the ability to bring to any prospective litigation case his unique talents and experience. While serving as City Attorney for Morro Bay and Assistant City Attorney for Pismo Beach from 1997 to 2008, Bob represented us on various legal matters and is extremely competent and possesses exceptional legal skills. During those years, I had the opportunity to witness Bob during Court proceedings. I was consistently impressed with Bob's presence and integrity, as well as his outstanding analytical and communication skills.

Without a doubt, Robert Gundert's legal services would be a tremendous asset to ABAG and I recommend him without reservation.

If I can be of further assistance, please do not hesitate to contact me.

Very Truly Yours,

  
Robert W. Schulte  
Town Attorney

Ms. Stallman/Jill:

Thank you again for calling this afternoon. It was a pleasure talking with you about Chicago, the Midwest and the ABAG panel selection process.

Per our discussion, I am attaching certain items that reflect some of my public entity representation experience. One of the attached items is a letter of recommendation from Wendy Stockton, who was formerly the Senior Assistant City Attorney for the City of Santa Maria. Wendy wrote the letter for me at a time when we were considering throwing my/our hat in the ring to do some work for North American Risk Services.

In addition, I previously prepared an informal list of public entity defense cases that I brought to a lunch meeting a few months ago with Kristine Moellenkopf and Phil Sinco, both currently with the City of Santa Maria. Phil and I had worked together at Borton, Petrini & Conron (now Borton Petrini) in San Luis Obispo. I had contacted him about the prospect of handling some of the city's litigation once again since our firm was in the process of opening a satellite office in San Luis Obispo, which is just 35 miles north of Santa Maria. Santa Maria had counsel for such matters already but they were willing to set up a meeting. We met up again for lunch a couple of weeks ago and, although I have yet to receive an assignment, my understanding is that I am on their list of approved counsel.

Finally, I am attaching two appellate decisions relating to cases I handled for public entities in San Luis Obispo County. The *Stewart v. City of Pismo Beach* case is a reported decision. *Spooner v. City of Grover Beach* is not. Both are interesting cases but please don't feel compelled to read them. I simply attached them in case they might be useful in providing additional background.

Thank you again for calling today. If you need any additional information please do not hesitate to let me know. I will await further word from you regarding a possible meeting.

Bob Gundert

Robert J. Gundert, Esq.

Campbell, Warburton, Fitzsimmons, Smith, Mendell & Pastore

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# Campbell Warburton Fitzsimmons Smith Mendell & Pastore

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### **Robert J. Gundert, Shareholder**

Robert Gundert has more than 30 years of civil litigation and trial experience including lawsuits involving real property, business, civil rights, employment, personal injury, wrongful death, construction and estate disputes. He has also handled a variety of civil appeals, including two cases that have been published (Graham v. Beers (1994) 30 Cal.App.4th 1656 and Stewart v. City of Pismo Beach (1995) 35 Cal.App.4th 1600). He has also written various articles

and spoken on topics relating to litigation. He joined the Campbell Warburton firm in 2012 and continues his practice in business and general civil litigation.

Bob enjoys spending time with his family and friends in a variety of settings, including sporting activities (as a spectator or participant), hiking, travel and enjoying all that California has to offer. Not to be overlooked is his true fan devotion to his alma mater. He "bleeds Blue and Gold." Go Bears!

Born Lodi, California, June 27, 1957; admitted to bar 1982, California. Education: University of California, Berkeley (A.B 1979); University of Santa Clara (J.D. 1982). Member: State Bar of California; U.S. District Court, Northern, Southern, Central and Eastern Districts of California.

Reported Cases: Graham v. Beers (1994) 30 Cal.App.4th 1656; Stewart v. City of Pismo

Beach (1995) 35 Cal.App.4th 1600.

Publications: "Punitive Damages Reaffirmed," California Defense Magazine; "Assumption of Risk: A Common Sense Defense With a Bad Name," California Defense Magazine; and various articles for San Luis Obispo County Bar Bulletin. Lectures and Seminars: Public Entity Defense Seminar; Insurance Claims and Coverage Seminar.

Practice Areas: Civil Litigation; Commercial Litigation; Constitutional Law; Construction Accidents; Construction Law; Real Estate Litigation; Elder Abuse; Insurance Law; Intellectual Property and Trade Secrets; Probate Litigation; Public Entity Defense

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April 11, 2013

Robert J. Gundert  
Campbell, Warburton, Fitzsimmons,  
Smith, Mendell & Pastore  
64 West Santa Clara Street  
San Jose, California 95113

**SUBJECT: RECOMMENDATION – NORTH AMERICAN RISK SERVICES**

Bob:

It is my pleasure to submit this letter recommending your legal services on a panel of defense counsel for municipal claims handled by North American Risk Services.

During the time you practiced in San Luis Obispo, California and I managed litigation matters for the City of Santa Maria (2002-2005), I hired you to assist the City in a variety of administrative and court disputes. You worked capably and tirelessly on diverse assignments, including:

1. Defense against a personal injury claim alleging a police vehicle rear ended the Plaintiff. You successfully settled the case for nuisance value.
2. Defense on several claims by a City employee who was struck by a private driver while on the job. You negotiated a global settlement and resolved the case early and favorably.
3. Defense of a personal injury claim by a private party arising out of cross claims in a vehicle personal injury case. You secured a prompt dismissal on technical grounds.

Bob Gundert  
April 11, 2013  
Page two

4. Defense through administrative proceedings and court trial of a complicated employee discipline matter. In the second round of court proceedings the matter was resolved acceptably to the City.
5. Defense of a personal injury case filed against the City and an employee arising out of a vehicle accident while the employee was on the job. You secured a prompt dismissal on technical grounds.
6. Representation of the City as a plaintiff in a public nuisance case filed against a taxicab operator who was subjecting members of the public to unsafe practices. You worked closely with the City Attorney's Office to stop the business and install a safe taxicab system.

We wish you the best in your continuing practice and in this upcoming venture.

Very sincerely,



**WENDY STOCKTON**

Senior Assistant City Attorney/Utilities Counsel

APR 11 2013

## **Public Entity Representation**

**Santa Maria Cases:** See letter from Wendy Stockton

### **Other Public Entity Cases:**

**Results in bold print represent outright defense results ( verdict, award or dismissal).**

#### **City of Atascadero:**

Civil Rights/Employment Action filed by former Police Chief—defended Mayor—settled

Personal injury lawsuit involving a tree that fell onto a van—settled

Wrongful death lawsuit following single vehicle accident that went to binding arbitration—**defense**

#### **City of Arroyo Grande:**

Civil rights action **dismissed** during pleadings stage that went up on appeal—**prevailed on appeal**

Civil rights action involving a hoarder—settled

#### **City of Guadalupe:**

Police MVA lawsuit—settled

#### **City of Morro Bay:**

Personal injury (motor vehicle vs. pedestrian) case—settled

Trip and fall case—**summary judgment**

Participated in Cayucos Sanitary District v. City of Morro Bay case involving desalination plant—went to trial—**nominal damages of \$1 awarded**

Qualman v. City of Morro Bay – oyster contamination case—**dismissed**

#### **City of Paso Robles:**

At least one personal injury case—settled

Excessive force case that went to trial—**defense verdict**

#### **City of Pismo Beach:**

SEI, Inc. v. City of Pismo Beach – Indian burial case—**dismissed**

Stewart v. City of Pismo Beach – went to trial—plaintiff result—appealed and settled

\_\_(police officer)\_\_ v. City of Pismo Beach—settled

**City of San Luis Obispo:**

Numerous personal injury cases—settled

Construction lawsuit based on breach of mandatory duty—summary judgment

**State of California**

One, perhaps two, employment lawsuits, including one wrongful discharge case involving a woman terminated from Atascadero State Hospital due to evidence indicating she had become inappropriately involved with a patient/inmate—settled

Personal injury action (trip and fall) representing Regents of the University of California—settled

I am sure there were others. These are the cases I recall. I recall also representing the City of Lompoc in at least one lawsuit, which may have been a personal injury action.

35 Cal.App.4th 1600  
Court of Appeal, Second District, Division 6,  
California.

Mark **STEWART**, Plaintiff and Respondent,  
v.

CITY OF **PISMO BEACH** et al., Defendants and  
Appellants.

No. B085384.

May 25, 1995.

Review Denied Aug. 31, 1995.

Police officer, whose legal defense to tavern's due process suit was discontinued by city after officer cooperated with tavern by giving statement, filed writ of mandate to compel city to continue its representation. The Superior Court, San Luis Obispo County, No. CV 75189, Paul H. Coffee, J., granted writ. City appealed. The Court of Appeal, Yegan, J., held that: (1) actual and specific conflict of interest existed between officer and city, and city thus could discontinue officer's legal defense pursuant to statute, and (2) city was not estopped by its previous representation of officer from withdrawing its representation.

Reversed.

West Headnotes (7)

<sup>[1]</sup> **Appeal and Error**  
Cases Triable in Appellate Court

Trial court's legal conclusions are subject to de novo review on appeal.

Cases that cite this headnote

<sup>[2]</sup> **Municipal Corporations**  
Duties and liabilities

City's statutory duty to provide its employees

with defense in civil actions is mandatory, unless there exists one of the exceptions provided by statute listing grounds for refusal to provide defense, or by statute governing actions or proceedings brought by public entity. West's Ann.Cal.Gov.Code §§ 995, 995.2, 995.4.

3 Cases that cite this headnote

<sup>[3]</sup> **Municipal Corporations**  
Duties and liabilities

Actual and specific conflict of interest existed between police officer and city in litigation arising from alleged misconduct by city and police officer in investigating tavern, and city thus could discontinue officer's legal defense pursuant to statute; officer's cooperation with tavern required city to discredit officer in order to defend other city employees, conflict met statutory definition of "specific conflict of interest" in that it was "specified by statute or by a rule or regulation of the public entity," and, even if it were not so specified, it would be absurd to give statute literal meaning if to do so would require city to pay for attorney to help officer defeat city in litigation. West's Ann.Cal.Gov.Code §§ 825.6(a), 995.2(a)(3), (c).

4 Cases that cite this headnote

<sup>[4]</sup> **Statutes**  
Relation to plain, literal, or clear meaning; ambiguity

Language of statute is not to be given literal meaning if doing so would result in absurd consequences which Legislature did not intend.

Cases that cite this headnote

<sup>[5]</sup> **Estoppel**

← Municipal corporations in general

City was not estopped by its previous representation of police officer in litigation with tavern from withdrawing that representation after officer cooperated with tavern; city did not know when it began defending officer intended to testify for tavern, officer negotiated favorable settlement rather than relying to his detriment on defense provided by city, officer would not sustain more injury if city were not estopped since he was insulated by settlement from liability, and estopping city would nullify public policy against requiring public entity to pay for defense of former employee whose personal interests were in conflict with that of entity. West's Ann.Cal.Gov.Code § 995.2(c).

9 Cases that cite this headnote

[6]

**Estoppel**

← Estoppel Against Public, Government, or Public Officers

Elements of claim of estoppel against government are: (1) party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that party asserting estoppel had right to believe it was so intended; (3) other party must be ignorant of true state of facts; (4) he must rely upon the conduct to his injury; and (5) plaintiff must demonstrate that injury to his personal interests if government is not estopped exceeds injury to public interest if government is estopped.

3 Cases that cite this headnote

[7]

**Estoppel**

← Estoppel Against Public, Government, or Public Officers

Estoppel will not be applied against government if to do so would effectively nullify strong rule of policy adopted for benefit of public.

Cases that cite this headnote

**Attorneys and Law Firms**

\*1602 \*\*383 Robert J. Gundert, Borton, Petrini & Conron, San Luis Obispo, for appellants.

Gayle L. Peron, San Luis Obispo, for respondent.

**Opinion**

YEGAN, Associate Justice.

The City of **Pismo Beach** and its city council (City) appeal from a trial court order overruling their demurrer to and granting a petition \*1603 for writ of mandate filed by former City Police Officer Mark **Stewart (Stewart)**. The writ compels the City to provide **Stewart** with a defense, i.e., separate counsel, in a federal civil rights action filed against him, the City, and several other City police officers (the federal action). Because we conclude that **Government Code section 995.2, subdivision (c)** allows the City to withdraw from the defense of **Stewart** and that the City is not estopped from doing so, we reverse.<sup>1</sup>

*Facts*

**Stewart** was a City police officer from June 1991 until October 1993. While employed by the City, **Stewart** participated in one of two undercover investigations conducted by the City's police department concerning narcotics activity at Harry's Cocktail Lounge (Harry's). Six patrons of Harry's were arrested as a result of these investigations. The City shared the results of the investigations with the California Department of Alcohol and Beverage Control (ABC). After receiving this information, the ABC began proceedings to revoke Harry's liquor license. In addition, the City considered revoking the dance license it had issued to Harry's.<sup>2</sup>

In May 1993, the owners of Harry's (plaintiffs) filed the federal action. Their complaint alleges that the investigations and licensing proceedings were the product of selective law enforcement and therefore violated their rights to due process and equal protection. Plaintiffs named as defendants the City, its city council, its chief of

police, **Stewart** and other police officers involved in the investigations. Attorneys Martin Mayer and Robert Jagiello were retained by the City to represent it and its employees, including **Stewart**, in the federal action.

In October 1993, **Stewart** voluntarily resigned from his position as a City police officer. The City continued, however, to defend him in the federal action. In December 1993, an investigator employed by the owners of Harry's requested an interview with **Stewart**. Without notifying Jagiello, or any other person affiliated with the City, **Stewart** granted the interview.

As a result of the interview, **Stewart** signed a declaration stating that: (a) he had no training in conducting an undercover drug investigation prior to the investigation of Harry's; (b) he wanted to investigate other bars in the City but was instructed to concentrate his efforts on Harry's; (c) his superiors pressured him to lie in his police report and to omit facts which were favorable to Harry's; (d) the chief of police instructed **Stewart** to lie during \*1604 a city council meeting concerning Harry's; (e) the chief of police "wanted Harry's ... to be closed and, through enforcement of the law relative to Harry's sought to obtain that end"; and (f) "Harry's ... was treated differently than any other bar in [the City] by the Chief [of Police]." In exchange for his truthful testimony concerning these matters, the plaintiffs agreed to dismiss their claims against **Stewart** in his individual capacity.

The City and its attorney, Jagiello, were understandably upset when they learned that **Stewart** was cooperating with the plaintiffs. Jagiello informed **Stewart** that the City would no longer defend or indemnify him because **Stewart** had failed to cooperate in his own defense and because his capitulation to Harry's created a conflict of interest.<sup>3</sup> \*\*384 **Stewart** asked the City to retain separate counsel to represent him. When the City refused, **Stewart** filed the petition for writ of mandate requiring the City to do so.

The City demurred to the petition, arguing that **Government Code sections 825 and 995.2** allowed it to withdraw its defense of **Stewart** because **Stewart** created a conflict of interest by failing to cooperate in the defense, and because **Stewart** was no longer in need of a defense. **Stewart** opposed the demurrer. While he admitted that his conduct created a conflict between himself and the City's attorneys, **Stewart** claimed he had no conflict with the City itself. Accordingly, **Stewart** contended, there was no conflict of interest which would justify the City's withdrawing its defense.

After a hearing, the trial court overruled the City's

demurrer and granted **Stewart's** petition. It found that the City was "estopped from denying a defense to [**Stewart**], since a defense was previously provided and then discontinued." The City then filed this appeal.

### Standard of Review

<sup>[1]</sup> The City's demurrer admits the truth of all allegations contained in **Stewart's** petition. Like the trial court, we are asked to decide only issues of law. (*Gray v. Stanislaus County* (1957) 154 Cal.App.2d 700, 316 P.2d 678.) Thus, the trial court's legal conclusions are subject to de novo review on appeal. (*Rudd v. California Casualty General Ins. Co.* (1990) 219 Cal.App.3d 948, 951, 268 Cal.Rptr. 624.)

### \*1605 Discussion

<sup>[2]</sup> **Government Code section 995** requires the City to "provide for the defense of any civil action or proceeding brought against [an employee or former employee], in his official or individual capacity or both, on account of an act or omission in the scope of his employment..." The duty to provide employees with a defense in civil actions is mandatory, unless one of the exceptions included in **sections 995.2 and 995.4** exists. (*Sinclair v. Arnebergh* (1964) 224 Cal.App.2d 595, 598, 36 Cal.Rptr. 810.) The exception relevant here allows the City to discontinue the defense, "[i]f an actual and specific conflict of interest becomes apparent..." (**Gov.Code § 995.2, subd. (c).**) A "specific conflict of interest" is, "a conflict of interest or an adverse or pecuniary interest, as specified by statute or by a rule or regulation of the public entity." (**Gov.Code § 995.2, subd. (a)(3).**)<sup>4</sup>

<sup>[3]</sup> **Stewart's** cooperation with the plaintiffs in the federal action created an "actual and specific conflict of interest" between **Stewart** and the City. Before **Stewart** began to cooperate with the plaintiffs, his personal interests and those of the City were identical. The City had every reason to vigorously defend **Stewart** because its own liability hinged, at least in part, upon whether **Stewart's** conduct violated the plaintiffs' civil rights. Because the City was providing **Stewart** with a defense and had agreed that his alleged conduct was within the scope of his employment, the City would have been obligated to indemnify **Stewart** for any judgment awarded against him, including one against **Stewart** in his individual capacity. (**Gov.Code § 825.**)

Now that **Stewart** has cooperated with the plaintiffs, his interests are diametrically opposed to the City. The plaintiffs have agreed to dismiss their claims against **Stewart** if he testifies truthfully concerning the information related in his declaration. That testimony is directly contrary to the position taken by the City in the lawsuit. **Stewart** compromises the City by testifying consistently with his declaration. He risks his own position if he contradicts his declaration. To \*\*385 successfully defend its remaining clients, the City will be required to discredit **Stewart**. In our view **Stewart** and the City now have adverse interests in the federal action as a matter of law.

**Stewart** appears to acknowledge that this conflict of interest exists. He contends, however, that the conflict does not allow the City to cease paying \*1606 for his legal expenses because the conflict at issue is not “specified by statute or by a rule or regulation of the public entity.” (§ 995.2, subd. (a)(3).) We disagree.

Section 825.6, subdivision (a) allows the City to seek indemnity against **Stewart** only if he “willfully fail[s] or refuse[s] to reasonably cooperate in good faith in the defense conducted by the public entity[,]” or if his conduct was motivated by “actual fraud, corruption or actual malice....” (§ 825.6, subd. (a).) So long as **Stewart** cooperated with the City-provided defense, the City had no incentive to develop the facts necessary to prove that he committed fraud and therefore had no basis for seeking indemnity from him. **Stewart’s** refusal to cooperate in his own defense thus gives the City a claim for indemnification which it otherwise would not have had.

<sup>14</sup> Even if the conflict is not “specified by statute ...,” it is well settled that the “language of a statute is not to be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend. [Citations.]” (*Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal.App.4th 168, 178, 32 Cal.Rptr.2d 574.) Section 995.2, subdivision (c) appears to have been intended to allow a public entity to withdraw from the defense of an employee in conflict of interest situations because it is unreasonable to require a public entity to finance litigation directed against it. Here, **Stewart** is essentially asking the City to pay for a lawyer to help **Stewart** (and the plaintiffs) dig the City’s grave in the federal action. We think this is exactly the result subdivision (c) was intended to avoid.

<sup>15</sup> <sup>16</sup> <sup>17</sup> Nor is there any ground for here applying the doctrine of estoppel against the City. The elements of a claim of estoppel against the government are: “(1) the

party to be estopped must be apprised of the facts; [¶] (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; [¶] (3) the other party must be ignorant of the true state of facts; and [¶] (4) he must rely upon the conduct to his injury.” (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305, 61 Cal.Rptr. 661, 431 P.2d 245.) [¶] The fifth element requires the plaintiff to demonstrate that the injury to his personal interests if the government is not estopped exceeds the injury to the public interest if the government is estopped....” (*La Canada Flintridge Development Corp. v. Department of Transportation* (1985) 166 Cal.App.3d 206, 219, 212 Cal.Rptr. 334; see also *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 994–95, 4 Cal.Rptr.2d 837, 824 P.2d 643.) In addition, estoppel will not be applied against the government if to do so would effectively “nullify a strong rule of policy adopted for the benefit of the public.” (*Lusardi Construction Co. v. Aubry, supra*, 1 Cal.4th at pp. 994–95, 4 Cal.Rptr.2d 837, 824 P.2d 643.)

\*1607 None of these necessary elements are supported by the record. There is no evidence that the City knew, when it began to defend **Stewart**, that **Stewart** was aware of facts which would require him to testify favorably toward plaintiffs or that **Stewart** intended to do so. **Stewart** makes no claim that he was ignorant of the “true” facts; indeed, he is the only person who could have known those facts. **Stewart** could not possibly have relied to his detriment on the defense provided by the City. Far from relying on that defense, he personally negotiated a favorable settlement without even consulting with his attorney.

Nor can **Stewart** demonstrate that he will sustain more injury if the City refuses to pay for his defense than the City will sustain if it is required to do so. **Stewart** has already insulated himself from personal liability. On the present record, it is questionable whether he requires legal representation at all. If he retains his own counsel, **Stewart** may be entitled to recover his attorneys’ fees and costs from the City pursuant to section \*\*386 996.4.<sup>5</sup> The application of estoppel on these facts would essentially nullify the public policy, expressed in section 995.2, subdivision (c), against requiring a public entity to pay for the defense of a former employee whose personal interests are in conflict with those of the public entity.

Finally, the trial court’s rationale that the City could not withdraw from providing a defense, previously given, is at variance with section 995.2, subdivision (c) which provides: “If an actual and specific conflict of interest becomes apparent subsequent to the 20-day period

following the employee's written request for defense, nothing herein shall prevent the public entity from refusing to provide further defense to the employee. The public entity shall inform the employee of the reason for the refusal to provide further defense."

The order and judgment overruling demurrer and granting petition for issuance of writ of mandate is reversed. The trial court is directed to enter an order sustaining the demurrer without leave to amend and denying the writ petition. Costs to appellants.

### *Conclusion*

Section 995.2, subdivision (c) allows the City to refuse to provide a further defense to **Stewart** because, by cooperating with the city's opponents in the federal action, **Stewart** has created a conflict of interest between \*1608 himself and the City. None of the facts alleged in **Stewart's** petition provide a basis for estoppel against the City.

STONE, P.J., and GILBERT, J., concur.

### **All Citations**

35 Cal.App.4th 1600, 42 Cal.Rptr.2d 382, 95 Daily Journal D.A.R. 8329

### Footnotes

- 1 All statutory references are to this code unless otherwise stated.
- 2 The record does not indicate whether either license was actually revoked.
- 3 Before withdrawing as **Stewart's** counsel, Jagiello also made a series of unflattering public statements concerning **Stewart's** veracity and requested that the local district attorney consider charging **Stewart** with perjury. In response to a motion filed by **Stewart** and the plaintiffs, the federal district court disqualified Jagiello from representing any of the remaining defendants in the federal action.
- 4 The City also contends that it is entitled to withdraw its defense under section 995.2, subdivision (a)(2), because **Stewart's** declaration is tantamount to an admission that he committed "actual fraud" by filing a false police report and lying to the city council. Our decision on the conflict of interest issue makes it unnecessary for us, at this time, to decide whether **Stewart's** alleged fraud provides an additional basis for the City's withdrawal from his defense.
- 5 Section 996.4 provides: "If after request a public entity fails or refuses to provide an employee or former employee with a defense against a civil action or proceeding brought against him and the employee retains his own counsel to defend the action or proceeding, he is entitled to recover from the public entity such reasonable attorney's fees, costs and expenses as are necessarily incurred by him in defending the action or proceeding if the action or proceeding arose out of an act or omission in the scope of his employment as an employee of the public entity, but he is not entitled to such reimbursement if the public entity establishes (a) that he acted or failed to act because of actual fraud, corruption or actual malice, or (b) that the action or proceeding is one described in Section 995.4."

 KeyCite Red Flag - Severe Negative Treatment  
Unpublished/noncitable December 7, 2005  
2005 WL 3304982  
Not Officially Published  
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)  
Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Second District, Division 6,  
California.

Nathan B. **SPOONER**, Plaintiff and Appellant,  
v.  
CITY OF **GROVER BEACH** et al., Defendant and  
Respondent.

2d Civil No. B178096.

(San Luis Obispo County Super. Ct. No.  
CV030134).

Dec. 7, 2005.

Martin J. Tangeman, Judge, Superior Court County of  
San Luis Obispo.

#### Attorneys and Law Firms

Nathan B. **Spooner**, in pro. per., for Plaintiff and  
Appellant.

Smith & Tardiff, Neil S. Tardiff and Robert J. Gundert for  
Defendant and Respondent.

#### Opinion

GILBERT, P.J.

\*1 Plaintiff Nathan B. **Spooner** appeals a judgment dismissing his discrimination action against defendant City of **Grover Beach** (City) after the trial court sustained a demurrer to his third amended complaint. The trial court properly sustained the demurrer. **Spooner's** complaint relied on conclusory allegations and was uncertain. He did not plead valid causes of action against the City for exempting some homeowners from a recreational vehicle ordinance, for discriminatory enforcement of the ordinance, for violation of the federal Civil Rights Act (42 U.S.C. § 1983) or for denial of equal protection. He also made admissions in court which undermined his

pleadings. We affirm.

#### FACTS

In 1996, the City enacted **Grover Beach** Municipal Code (GBMC) section 5217, which provides that trailer coaches exceeding 22 feet in length may only be parked on a side or rear yard of a residence. This restriction does not apply to owners who parked trailers on their property prior to the enactment of the ordinance. (GBMC § 5219.)

**Spooner**, a "Caucasian," and his wife of "American Indian and African descent," moved to the City in 1998. He parked a trailer exceeding 22 feet in length in his driveway. His neighbors complained to the City. **Spooner** moved the trailer to a storage facility after the City's code enforcement officer warned his wife about the ordinance.

Months later, **Spooner** complained to the City that his neighbors had committed similar violations but had not been cited. On April 21, 2000, John Bradbury, the City's Chief of Police, wrote to **Spooner**. He stated: "Your complaint regarding trailers has been received. Our new Code Enforcement Officer [ ] starts work on April 27 and your list will be one of the first complaints that he will work. [¶] The City has been without an official Code Enforcement Officer for over a year. As a point of information, our Code Enforcement is complaint driven. If no one complains, no actions are taken unless the violation is obvious."

In June of 2001, **Spooner** moved the trailer to the street in front of his home. He received a 72-hour parking violation. City police officers asked **Spooner's** wife to move the trailer. She agreed, but complained that another trailer parked one block away should also receive a citation. The officers drove away.

**Spooner** again complained to the City about other trailers parked in the neighborhood. On July 5, 2001, Gary Youngblood, the City Code Enforcement Officer, wrote to **Spooner**. He stated: "You should be aware that each and every complaint that I receive is investigated, but in a prioritized manner. While all of our citizen's concerns are important to us, some require immediate attention.... (The two locations referenced in your April 13, 2000 complaint, were addressed and were moved as required.) [¶] [P]lease note the requirements [in GBMC section 5217] for parking R.V.'s on private property ... 'side or rear yard,' and 'size'.... These factors, along with the 'Grandfather Clause'-denoting vehicles parked prior to

the adoption of the current ordinance-1996, could serve to mitigate the fact that in some instances R.V.'s are allowed to park, where others are not." (Italics added.)

### **Spooner's Pleadings**

\*2 On February 6, 2003, **Spooner** filed a complaint in propria persona against the City for arbitrary and improper selective code enforcement and denial of equal protection. The City demurred, claiming the complaint did not state a cause of action and was uncertain.

**Spooner** filed an amended complaint which contained legal arguments. The City demurred and the trial court sustained it with leave to amend. His second amended complaint also contained legal arguments. The court sustained a demurrer again with leave to amend.

On January 12, 2004, **Spooner** filed his third amended complaint. He attached Bradbury's and Youngblood's letters as exhibits to that complaint. He pled two causes of action: "Arbitrary and Improper Selective Code Enforcement" and "Denial of Equal Protection." He alleged, among other things: "The unknown ... persons who first complained about [his] trailer obviously noticed [his] interracial marriage." He said that because "police cruise[r]s 'came swooping down' ... to [his] residence ... when the trailer was parked on the street in front of his house, this can only be described as an act of discriminatory hostility."

He alleged: "The ill will or invidious discrimination on the part of the city is from plaintiff's interracial mixed marriage." "There is no other apparent reason for plaintiff having to move a trailer from his own property while at the same time neighbors have similar trailers and RVs in their driveways..." He claimed it was arbitrary discrimination for the City "to classify some citizens as exempt from the ordinances in question." He alleged that he complained about the enforcement of the ordinance at a city council meeting. But because the City did not respond to his questions, it thereby "approved and sanctioned this action described above to be an official policy of City government. This policy allows unjustified discretion to code enforcement officials to enforce for some while not to enforce for others."

### **The Hearing**

The City demurred. At the hearing, the court noted that at a prior hearing **Spooner** said he was "not alleging any racial animus on behalf of the City..." The court noted that this complaint added a new theory that the City discriminated against him because he was "new to the neighborhood."

**Spooner** replied: "[T]here are still vehicles within sight of my house that the City won't make them move. They ... made me move ours.... So there is something going on that's not evident. *It could be discrimination. It could be a good-old-boys' network. I don't know what it is.*" (Italics added.)

## **DISCUSSION**

### **I. Defective Pleading**

The demurrer was properly sustained. The City claimed **Spooner's** complaint was uncertain and included "surmises as to the reasons why he has allegedly sustained harm."

Instead of alleging facts, **Spooner** speculates. For example, his complaint states: "Plaintiff is Caucasian and his spouse is not. Since the police stated that it was a neighbor's complaint that led to the first citation ... and yet plaintiff's complaints have not resulted in other citizens having to move their vehicles ... *then the city must feel it is justified in treating plaintiff in a manner different than others because of his interracial mixed marriage.*" (Italics added.) "[T]he unknown person or persons who first complained about [his] trailer obviously noticed [his] interracial marriage." (Italics added.)

\*3 "In pleading, the essential facts upon which a determination of the controversy depends should be stated with clearness and precision so that nothing is left to surmise. [Citation.]" (*Bernstein v. Piller* (1950) 98 Cal.App.2d 441, 443.)

The trial court also found that the allegations of the complaint were inconsistent and contradicted Bradbury's and Youngblood's letters, which **Spooner** attached as exhibits to that pleading. A complaint is demurrable where its allegations are ambiguous or contradictory. (*Miller v. Brown* (1951) 107 Cal.App.2d 304, 306; *Evarts v. Jones* (1951) 104 Cal.App.2d 109, 111.) "If facts appearing in the exhibits contradict those alleged, the facts in the exhibits take precedence. [Citation.]"

(*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447.)

**Spooner** alleged the city offered no explanation for not enforcing the restrictions against others. But he attached Youngblood's letter which explained why some vehicles "are allowed to park" and "others are not," and Bradbury's letter which mentioned the personnel shortage.

**Spooner** alleged that other than his interracial marriage there is "no other apparent reason" to explain why he is treated differently. (Italics added.) But he also alleged the City's "motives were based on the fact that [he] and [his] family were new to the neighborhood," that the City vests "unjustified discretion" in code enforcement officers or its ordinances exempt classes of owners. At the hearing, he conceded he was unable to state the reason for the alleged discrimination. The court was not required to speculate about which of the conflicting allegations **Spooner** relied on. (*Bernstein v. Piller, supra*, 98 Cal.App.2d at p. 443.)

## II. Stating a Cause of Action for Arbitrarily

### Exempting Some Owners from GBMC Section 5217

**Spooner** alleged the City arbitrarily discriminates by exempting some owners from GBMC section 5217. But those who purchased their homes prior to its enactment had the expectation that they could park recreational vehicles on their property without restrictions. The retroactive application of GBMC section 5217 would interfere with those expectations. (*Haves v. City of Miami* (11th Cir.1995) 52 F.3d 918, 922 ["state may legitimately use grandfather provisions to protect property owners' reliance interests"]; *Nordlinger v. Hahn* (1992) 505 U.S. 1, 12; *City of New Orleans v. Duke* (1976) 427 U.S. 297, 305-306; *Des Jardin v. Town of Greenfield* (1952) 262 Wis. 43, 47, 49 [53 N.W.2d 784, 786-787].)

By contrast, **Spooner** and others who bought land after 1996 were on notice of the restrictions before they purchased. **Spooner** does not allege that the City enacted GBMC section 5217 to racially discriminate. He has not met his burden "to negative every conceivable basis which might support" the ordinance. (*Lehnhausen v. Lake Shore Auto Parts Co.* (1973) 410 U.S. 356, 364.) The City rationally distinguished between classes of owners who had different expectations when they purchased their homes. (*Nordlinger v. Hahn, supra*, 505 U.S. at p. 12; *Del*

*Oro Hills v. City of Oceanside* (1995) 31 Cal.App.4th 1060, 1082.)

## III. Stating a Cause of Action for Selective Enforcement

\*4 **Spooner** alleged: The City's "failure to act in enforcing the code for others, demonstrates an intent to punish the exercise of plaintiff's constitutional rights since they decided to enforce the law in a non-uniform manner.... This action also evidences the city's malicious or bad faith intent to deny plaintiff's constitutional rights." "The standard of 'laxity of enforcement' presumes there is a reasonable explanation as to why the law is not enforced in an evenhanded manner.... Yet in the present case, it is not as if the vehicles are inaccessible." "In Plaintiff's neighborhood, the vehicles are stationary. It is not as if the enforcing officer is unable to find" them.

But these conclusory allegations and arguments do not state facts to support a cause of action. (*Taylor v. Mitzel* (1978) 82 Cal.App.3d 665, 675.) "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of law or fact...." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Moreover, **Spooner** did not allege whether the vehicle owners he complained about were exempt from the ordinance.

**Spooner** claimed the City had a duty to enforce the ordinance against all violators. But he does not allege a statutory basis for this claim. (*Lopez v. City of Oxnard* (1989) 207 Cal.App.3d 1, 13.) He admits he violated the code. The City properly cited him. Discriminatory enforcement is not established simply because all violators are not pursued. (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 299.)

Moreover, the complaint does not join parties that **Spooner** claims selectively enforced this ordinance. He alleges police officers ignored his wife's complaint. In conclusory language he alleges they exhibited "discriminatory hostility." He refers to Bradbury, Youngblood and unnamed "city officials." But none of them are named as defendants and his wife is not a plaintiff. The City is the only named defendant.

He alleges the City "refuses to enforce the code for other violators in the city" and claims his complaints "have not resulted in other citizens having to move their vehicles...." But Youngblood's letter undermines those allegations by showing that two vehicles **Spooner** complained about were cited and moved. (*Holland v. Diesel Internat., Inc., supra*, 86 Cal.App.4th at p. 1447.)

#### IV. Pleading Municipal Liability Under

##### 42 United States Code Section 1983

**Spooner** contends he adequately pled facts to state a cause of action against the City under the federal Civil Rights Act. (42 U.S.C. § 1983.) We disagree.

“Local governments have no liability under 42 United States Code section 1983 simply because their employees may have violated a plaintiff’s constitutional rights; the doctrine of respondeat superior does not apply.” (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328; *Monell v. Dept. of Social Services* (1978) 436 U.S. 658, 691.) “Entity liability may arise in one of two forms. The municipality may itself have directed the deprivation of federal rights through an express government policy.... Alternatively, [it] may have in place a custom or practice so widespread in usage as to constitute the functional equivalent of an express policy.” (*Choate*, at p. 328.)

\*5 **Spooner** concedes the City had no “written policy” that authorized discrimination. He claims, however, that he adequately alleged a custom or practice sufficient to satisfy *Monell* standards. We disagree. The practice must be so permanent and well settled as to constitute the equivalent of an express policy authorized by the City’s policy makers. (*Monell v. Dept. of Social Services*, *supra*, 436 U.S. at p. 691; *Choate v. County of Orange*, *supra*, 86 Cal.App.4th at p. 328.) “ ‘Rigorous standards of culpability and causation must be applied’ to ensure that the municipality, through culpable misconduct, was the ‘moving force’ behind the injury alleged. [Citation.]” (*Choate*, at p. 328, italics added.)

Here **Spooner’s** complaint does not meet this standard. He alleged all the officers who came to his residence and ignored his wife’s verbal complaints “acted ... with intent to discriminate based on policy that was sanctioned by the city council members....” But this vague and conclusory language does not suffice. (*Harper ex rel. v. Poway Unified School Dist.* (S.D.Cal.2004) 345 F.Supp.2d 1096, 1108 [conclusory allegations of discrimination are insufficient].) “A plaintiff must allege with particularity facts in the form of specific overt acts. [Citations.]” (*Taylor v. Mitzel*, *supra*, 82 Cal.App.3d at 673.)

**Spooner** does not specifically describe the City’s policy or how it trained or supervised enforcement officers. He does not state facts showing it had a history of encouraging or condoning discrimination. Nor does he supply “any underlying factual detail” about how it was the moving force or proximately caused his damages. (*Haskins v. San Diego Dept. of Public Welfare* (1980) 100 Cal.App.3d 961, 973.) He alleges he incurred storage fees, but does not explain why he could not have parked the trailer in his side or rear yard.

**Spooner’s** complaint states the City’s failure to explain why the police did not enforce the code against everyone proved it had a discriminatory enforcement policy. But “a merely unexplained difference in police treatment of similar complaints made by different people” does not establish a denial of equal protection. (*Hilton v. City of Wheeling* (2000) 209 F.3d 1005, 1008.) Bradbury’s and Youngblood’s letters show the City enforced the ordinance on a priority basis and gave rational nondiscriminatory explanations for not proceeding against others. **Spooner’s** allegation that the City vests discretion in its enforcement officers undermines the claim that it was the moving force.

Stripped of its speculation and conclusory language, **Spooner’s** complaint “relies on an assumption that different treatment is always irrational or motivated by discrimination. But this assumption is legally unsound and logically absurd: it would not only validate the ‘everyone-else-was-driving-75’ defense, but create a cause of action for damages on such a claim.” (*Fishing Co. of Alaska v. U.S.* (W.D.Wa.2002) 195 F.Supp.2d 1239, 1254.) Even “ ‘[t]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.’ ” (*Murgia v. Municipal Court*, *supra*, 15 Cal.3d at p. 299.) Here the fact that the City enforced this ordinance against others at **Spooner’s** request undermines his allegations.

#### V. Village of Willowbrook v. Olech

\*6 **Spooner** contends that he stated a cause of action for discrimination against the City under *Village of Willowbrook v. Olech* (2000) 528 U.S. 562. We disagree.

In *Olech*, the plaintiff asked a village to connect her property to the municipal water supply. The village demanded a 33-foot easement from Olech, while only requiring 15-foot easements from other property owners. Olech alleged the village did this in retaliation for her prior successful lawsuit against it, and was motivated by

“ill will.” (*Id.* at p. 563.) The Supreme Court held she could allege an equal protection claim as a “class of one,” even though she did not allege membership in a group. (*Id.* at p. 564.)

In his concurring opinion, Justice Breyer stated: “This case ... does not directly raise the question whether the simple and common instance of a faulty zoning decision would violate the Equal Protection Clause.” (*Village of Willowbrook v. Olech, supra*, 528 U.S. at p. 565.) “Zoning decisions ... will often, perhaps almost always, treat one landowner differently from another...” (*Ibid.*) But requiring proof of “‘illegitimate animus’ “ would be “sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right.” (*Id.* at p. 566.)

Subsequently, in *Hilton*, the Seventh Circuit stated: “We described the class of equal protection cases illustrated by *Olech* as ‘vindictive action’ cases and said they require ‘proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant.’ [Citation.]” (*Hilton v. City of Wheeling, supra*, 209 F.3d at p. 1008.) The municipality must have individually targeted the plaintiff “for reasons of a personal nature unrelated to the duties of the defendant’s position.” (*Ibid.*)

Here **Spooner** did not plead such facts and his conclusory allegations of “ill will” do not suffice. Unlike *Olech*, the City neither enacted the ordinance to target **Spooner** nor was he the only one cited. He successfully obtained enforcement by the City against two other owners. Moreover, the result would not change for another reason.

## VI. The Truthful Pleading Doctrine

The City contends that the trial court properly sustained the demurrer because **Spooner** made admissions which

contradicted the facts he alleged in the third amended complaint. We agree.

“As a general rule in testing a pleading against a demurrer the facts alleged in the pleading are deemed to be true...” (*Del E. Webe Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) But “a pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless.” (*Ibid.*) Where a party’s admissions contradict allegations in a pleading, the court may rely on the admissions and sustain a demurrer. (*Dwan v. Dixon* (1963) 216 Cal.App.2d 260, 265.)

\*7 Here the court found that at the first demurrer hearing **Spooner** said he was not claiming any racial animus on behalf of the City. At the last hearing, he said he did not know if the City was motivated by racial animus. That contradicted his pleadings. The court properly sustained a demurrer because these admissions undermined the allegations of his complaint. (*Dwan v. Dixon, supra*, 216 Cal. App.2d at p. 265.)

We have carefully reviewed **Spooner’s** remaining contentions and conclude that he has not shown reversible error.

The judgment is affirmed. Costs are awarded to respondent.

We concur: **YEGAN** and **COFFEE**, JJ.

## All Citations

Not Reported in Cal.Rptr.3d, 2005 WL 3304982





**ABAG PLAN CORPORATION**  
101 Eighth Street  
Oakland, CA 94607-4707

**MEMO**

**Date:** June 30, 2016  
**To:** PLAN Claims Committee Members  
**From:** Jill Stallman, ABAG PLAN Claims Manager  
**Re:** ABAG PLAN Defense Counsel Appointment  
Kern, Noda, Devine & Segal – Tom (TJ) Murray

**Recommendation**

After meeting with and interviewing this prospective defense attorney, staff recommends that the Claims Committee approve the appointment of Kern, Noda, Devine & Segal – San Francisco, CA (TJ Murray) to ABAG PLAN's defense counsel panel.

**Overview**

Kern, Noda, Devine & Segal (TJ Murray) is being recommended as a new appointment to the ABAG PLAN defense counsel panel. T.J. Murray has many years of experience successfully defending public entities while bringing a background in medical malpractice to better enable him in assessing bodily injury claims. TJ also has a background in construction to aid with property damage matters. He has worked for insurance carriers and is adept at interpreting contracts and policies which is helpful in tendering claims under contractual risk transfer/indemnification situations. Please review the attachments for additional information regarding his qualifications.

**Summary**

The Claims Committee, upon request by ABAG or a Member Entity, may hear or make recommendations with respect to adding or deleting law firms or attorneys from our defense counsel panel. The Claims Committee is being called upon to review the statement of qualifications, resume and other background information on Kern, Noda, Devine & Segal (TJ Murray) which has been provided.

Mr. Murray, a former professional athlete, is a spirited competitor and takes a very assertive approach to protecting public funds. He also is an experienced trial attorney which will bolster our defense should the need to try a case be inevitable. T.J. Murray was referred to ABAG PLAN by Randy Hom, City Attorney – Cupertino. His rates (\$185/hr Partner, \$170/hr Associate, \$100/hr Paralegal) are well in line with the currently negotiated rates of other panel counsel.

Staff recommends we add Kern, Noda, Devine & Segal (TJ Murray) to the defense panel.



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May 9, 2016

**VIA ELECTRONIC MAIL ONLY**

Ms. Jill Stallman  
Claims Manager  
ABAG PLAN Corporation  
101 8<sup>th</sup> Street  
Oakland, California 94607  
Deputy District Attorney  
[JillS@ABAG.CA.gov](mailto:JillS@ABAG.CA.gov)

Re: City of Cupertino  
ABAG PLAN Defense Counsel Appointment – Thomas Joseph Murray

Dear Ms. Stallman:

This letter shall serve as my recommendation in support of the appointment of Thomas Joseph Murray to ABAG PLAN defense counsel.

Mr. Murray is an experienced litigator and trial attorney. He is an associate of the American Board of Trial Advocates, and has completed twenty plus trials to verdict. His legal experience includes service as a judicial extern to the Honorable Ira Brown in the law and motion department of San Francisco County Superior Court, and service as second chair to Robert T. Lynch at Lynch Loofbourrow et al. in San Francisco with respect to complex medical malpractice and product liability matters. As a lead attorney, he served with distinction in general counsel's office of USAA Insurance Company defending a variety of legal actions arising out of tort and personal injury (catastrophic injury and wrongful death), premises and general liability litigation involving municipal agencies, construction defect litigation, contracts, litigation under the Americans with Disabilities Act of 1990 ("ADA"), and fraud/special investigative unit work with insurers.

Currently, he serves as a Partner in Kern, Noda et al. in San Francisco. His team includes an associate attorney that served previously as a Deputy City Attorney for the City of Long Beach, handling a variety of matters including municipal litigation arising out of torts, personal injury, civil rights, employment, and other constitutional challenges or violations.

Mr. Murray is a skilled tactician and a formidable litigator and trial attorney. Based on his experience with insurers, he is firmly grounded in the policies and principles that govern ABAG. His presence on the defense counsel panel would not only strengthen it, but ultimately give the panel a presence in the South Bay Area.

In the event that you or the panel should have any questions about Mr. Murray, please feel free to contact me directly.

Very truly yours,

City of Cupertino  
Office of the City Attorney



Randolph Stevenson Hom  
City Attorney

Attachments: Thomas J. Murray's Statement of Qualifications  
Thomas J. Murray's Curriculum Vitae

Cc: Jim Hill

# Kern, Noda, Devine & Segal - A Law Corporation

Home » Attorneys » Thomas J. Murray

## Thomas J. Murray

### *Partner*

After being released by the Seattle Seahawks in 1985, Mr. Murray decided to become a trial lawyer, finished his undergraduate work at Catholic University in Washington D.C. and attended law school at Golden Gate University in San Francisco. Mr. Murray was a merit scholar, on the dean's list, participated in the mock trial program, and was the first Golden Gate student to extern at the U.S. Attorney's office in San Francisco. Mr. Murray then clerked for the Honorable Ira A. Brown in the law and motion department of the San Francisco Superior Court where he learned the art of successful law and motion practice, inclusive of drafting successful summary judgment motions.

After graduating from Golden Gate in 1991, Mr. Murray practiced at the firm of Lynch, Gilardi & Grummer in San Francisco, CA. He practiced in the areas of medical malpractice, wrongful death, business, construction defect, intellectual property, insurance, professional liability, and employment litigation, working these cases up for trial and then sitting second chair at the trial thereof. After three and one half years, Mr. Murray became anxious to obtain first chair trial experience so he joined the staff counsel office of USAA Insurance Company in 1994. In this position Mr. Murray tried in excess of twenty personal injury jury trials to verdict in venues throughout the Bay Area. Mr. Murray has tried numerous excess exposure and major injury cases and resolved hundreds of other cases through the ADR process. He has handled cases in the areas of class action defense, business, contract, personal/catastrophic injury, construction, product liability, professional liability, premises liability, trade secret, advertising, Uninsured Motorist and punitive damage claims. Mr. Murray has attended hundreds of arbitrations and mediations. He has taken and defended hundreds of depositions.

After eleven years with USAA, Mr Murray joined McDowell Shaw & Colman in August 2006 where he handled personal/catastrophic injury actions, commercial/business litigation, product liability, professional liability, construction, and general liability cases from inception through resolution. Mr. Murray represents individuals, corporations and municipalities. He also serves as a mediator upon request. TJ Murray is now a partner at Kern, Noda, Devine & Segal.

Mr. Murray is licensed to practice law in all State and Federal courts within California. He is an arbitrator for the San Francisco Superior Court and a panelist for the San Francisco Bar Association's Early Settlement Program. He is a member of the American Board of Trial Advocates (ABOTA), San Francisco Bar Association, Association of Defense Counsel, Northern California Fraud Investigators Association (NCFIA), and Risk Management Society (RIMS).



**Thomas (T.J.) Murray**  
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**THOMAS J. (T.J.) MURRAY**  
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**A. EDUCATION**

J.D., 1991, Golden Gate University, San Francisco

Merit Scholarship, Dean's List, Mock Trial Program; 1<sup>st</sup> Golden Gate student to secure externship with United States Attorney Office in San Francisco and only Golden Gate Student to extern/clerk for Judge Ira Brown.

B.A., 1986, Catholic University of America, Washington, D.C.

All-American Football; Pi Gamma Mu Honor Society

**B. LEGAL WORK HISTORY**

KERN, NODA, DEVINE & SEGAL - Partner

3/11 – Present

Litigating lawsuits in the areas of personal and catastrophic injury, wrongful death, Municipal and premises liability, construction defect, professional liability, contracts/commercial transactions, and copyright/trade secrets from case inception through resolution, inclusive of trial and appellate practice. Also defend against fraudulent claims made to insurance carriers and prosecution of Qui Tam actions. Current clients include insurance carriers, TPA's, trucking companies, contractors, banks, technology corporations and Municipalities. Also serves as a mediator upon request and availability. Several dozen jury trials to verdict, hundreds of mediations and arbitrations

MCDOWELL, SHAW & COLMAN - Associate

9/06 – 3/11

Same areas of practice as noted above. Left the McDowell firm to join the Kern firm as a partner.

USAA INSURANCE COMPANY GENERAL COUNSEL -Trail Counsel 12/94 - 4/06

Representing USAA insured's in all phases of litigation, from inception through resolution, inclusive of appellate practice, on any type of case that arose from USAA's personal lines coverage, primarily involving personal/catastrophic injury, wrongful death, and premise liability along with the multiple other types of claims that can arise under a homeowner's policy. Two dozen jury trials to verdict with no verdict ever greater than what was offered to settle the case. Hundreds of negotiated settlements, structured settlements, mediations and arbitrations.

LYNCH, LOOFBOURROW, GILARDI AND GRUMMER – Associate

8/91 – 12/94

Represented a variety of corporate and individual clients in litigated cases in the areas of medical malpractice, wrongful death, professional liability, intellectual property/trade secret, construction defect, premise liability, contracts, product liability, toxic exposure, employment and business dissolution from inception through resolution, including appeal. Numerous jury trials as second chair for Robert T. Lynch. Moved to USAA to get first chair trial experience.

EXTERN, THE HONORABLE IRA A. BROWN, JR.

9/90 - 5/91

Judge Brown was the pre-eminent law and motion judge in San Francisco who literally wrote the book on Civil Procedure Before Trial that is exclusively used by practicing civil attorneys. Reviewed, analyzed and researched moving and opposition papers for matters on the following day's law and motion calendar. Responsible for briefing (getting cross-examined by) the Judge on the issue(s) presented and the merits of the arguments made in support/opposition thereto. Conducted legal research on submitted matters. Handled afternoon ex-parte calendar.

EXTERN, UNITED STATES ATTORNEY, SAN FRANCISCO

1/90-5/91

Research/writing for Organized Crime Strike Force. Prosecuted misdemeanor criminal actions in Federal District Court before both District Court Judges and Magistrates. Most cases were either petty bank embezzlement actions for a few hundred dollars or DUI on the Presidio. Handled these cases from filing of information, coordinating investigation with assigned FBI investigator and negotiating plea or bench trial.

**C. PROFESSIONAL ASSOCIATIONS AND LICENSES**

- American Board of Trial Advocates (ABOTA)
- U.S. District Court, Northern and Eastern Districts of California
- Ninth Circuit Court of Appeals
- Arbitrator, San Francisco Superior Court
- Panelist, San Francisco Superior Court Early Settlement Program
- Association of Defense Counsel
- Northern California Fraud Investigators Association (NCFIA)
- Risk Management Society (RIMS)

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REPLY TO SAN FRANCISCO OFFICE

April 14, 2016

**Thomas J. Murray's Statement of Qualifications**

I am a Partner in the Kern law firm and "Of Counsel" in the Colman Macdonald Law Group in L.A. I expect a new firm will be in existence by October 1, 2016, with its Northern California office on the Peninsula. The other offices will remain as noted above.

I have tried dozens of high exposure cases to verdict, never been hit for more than was offered to settle the claim, and am a member of the American Board of Trial Advocates. In addition to California, I am admitted to practice before the United States District Court, Northern, Central, and Eastern Districts.

My specialty areas of practice are as follows:

1. Tort and personal injury litigation (catastrophic injury, wrongful death, government claims acts);
2. ADA Litigation;
3. Premises and general liability litigation involving both municipal and non-municipal entities;
4. Construction defect litigation;
5. General contractual litigation and risk transfer/indemnity;
6. Fraud/SIU investigations.

From 1991 to 1994, I did medical malpractice defense and product liability litigation in the City of San Francisco. The product liability litigations were the large product cases brought against the Honda three wheel trikes in Federal Court. I participated in extensive law and motion, discovery, and preparing witnesses for deposition. Wanting to get more first chair trial experience, I went "in-house" with USAA Insurance Company as trial counsel. I tried approximately 22 jury trials in that time period. In 2006, I

returned to an insurance defense practice and began representing municipalities that were required to provide ADA transport services pursuant to unfunded federal mandate. Typically the municipalities own the buses and operations are contracted to a non-profit third party per an RFP. I also began doing work for an insurance company that typically insured large industrial contractors and involved with large scale county ventures, from road renovation projects to building reconstructions to power plants, etc. All of these cases involved expert issues of engineering, hydrology, soils compaction, insurance coverage and risk transfer through indemnity agreements.

My associate, Ms. Michele Levinsen, was a Deputy City Attorney for the City of Long Beach and city employees in civil actions, general tort liability, matters involving the Americans with Disabilities Act, premises liability, and personal injury defense, civil rights, employment disputes, and other constitutional issues. As lead attorney she has done 5 trials to verdict in both Federal and State courts on the 1<sup>st</sup> Amendment rights of a tattoo parlor, two employment actions, election law, and BI/TBI. She has done extensive motion practice in both Federal and State Court, inclusive of MSJ's on historic preservation involving 5<sup>th</sup> and 14<sup>th</sup> amendment issues along with ADA, civil rights, and actions involving HUD programs. In addition to California she is admitted to practice before the United States District Court, Central, Eastern and Southern Districts.

#### A. Municipal/Government Entity Litigation

For the past 10 years, I have represented various government agencies including county transit agencies, community college districts, third party vendors operating county ADA transport services, and a multi million dollar general and contractual case liability with a JPA on a co-generation power plant. These case have involved every aspect of litigation through trial. I have handled many dozens of litigated cases on behalf of municipal entities and at the same where municipal entities were involved in claiming rights to indemnity and/or intervention to recover workers' comp benefits. These cases have also involved experts from the fields of traffic management, accident reconstruction, biomechanics, human factors, orthopedics, neurology, psychology, etc, A few examples are as follows:

1. McGraw v. Top Grade/City of Hayward – This was an alleged “dangerous condition” case in a construction zone that spanned five miles of Mission Street in the City of Hayward. The issue was control over the projects and plaintiff's comparative fault. The jury “split the baby” and assessed liability three ways. Plaintiff's lowest pre-trial settlement demand was \$1 million, and plaintiff blackboarded \$1.7 million at trial. The jury awarded approximately \$500,000 to plaintiff, with plaintiff 30% at fault. Post trial motions involved issues of indemnity between the general contractor and the City of Hayward.

2. Fluker v. Kern Community College District – Plaintiff tried out for an Arena League football team at the Bakersfield Community College. He broke his femur running the 40 yard dash. He alleged a “dangerous condition” in the field. Fifteen minutes before the jury panel was to walk into the room and jury selection was to begin, plaintiff requested the civil action be dismissed and plaintiff indicated he would pursue his claim in the workers' compensation arena.

3. Hernandez v. Volunteer Center of Sonoma County and County of Sonoma – Plaintiff was a paraplegic riding on county subsidized ADA transport. She claimed a result to being improperly secured and sudden stop caused forward flexion and an increase in paralysis and additional three vertebral levels of responding. I got the county dismissed. Volunteer Center was able to settle the case for less than the cost of trial.

4. Gomez v. Contra Costa County Transit Authority – A bus passenger with a long history of meth abuse called the driver of the bus the N word. The driver stepped off the bus with the passenger and proceeded to beat him up. Plaintiff fabricated a huge number of claims which were revealed as fraudulent after all of his prior records were obtained. The case settled for approximately \$1,000.

5. SMUD v. F. Rodgers Insulation – This was a property damage accident while insulating a newly constructed co-generation power plant. SMUD brought suit for both tort and contract damages. The tort damages were based on loss of revenue from delay in putting power into the “grid” whose rates were regulated by the Federal Energy Regulatory Commission (FERC). This claim was in excess of seven figures. Deposition of the SMUD PMK revealed that SMUD did not own the power plant. It was owned by a separate JPA entity. Which I brought to everyone’s attention after the negligence statute had expired. The tort damages disappeared and the case was resolved on contractual remedies.

The above is just a random sampling of the cases I have handled involving a variety of municipal issues. Ms. Levinsen also has handled many dozens of similar cases, and others, as noted above.

#### B. Catastrophic Injury/Wrongful Death

I have handled dozens of catastrophic injury and wrongful death cases. I have prevailed on MSJ’s for assumption of the risk, lack of causation, and other affirmative defenses. In addition to the experts named above these cases also typically involve economists, life care planners, and medical billing experts on actual costs of future medical care. The have involved Medicare set asides and structuring both through CMS and third party vendors. The following are a few examples of various cases tries to verdict and/or settled as required:

1. Castro v. Ukiah Senior Center – The driver of an ADA transport van was exiting a senior center after dropping off a resident. As he reached the exit, he looked to his left at the two lanes of oncoming traffic. He was going to turn right. As traffic cleared, he made his right turn and hit plaintiff, who was riding the wrong way, on the street next to the curb, without a flag on her power chair. She suffered a broken hip and other trauma, was in the hospital for several surgeries, and never made it out. The case was bifurcated for liability and causation/damages. Defense verdict on the liability phase.

2. Kuwabara v. Self Help Center - The driver of an ADA transport van rear ended a SF motorcycle cop. The officer was transported and had 15/15 on his Glasgow readings. His orthopedic injuries were soft tissue. He claimed traumatic brain injury and affected cognitive abilities. Brain CT and MRI negative for any organic damage. Case was proceeding to trial when a subsequent brain MRI, neuro radiologist at UCSF confirmed it was more likely than not traumatically induced given the lack of any ischemic problems in plaintiff's medical history. The case settled.

3. Piol v. Corwin - Plaintiff, an SFPD motorcycle officer, was called in by undercover to make a traffic stop. He entered the wrong lane of travel coming up a hill in San Francisco. He did not have his siren on until he reached the crest of the hill. Defendant is coming up the other side of the hill in his lane of travel and there is a head on collision. The court refused to bifurcate liability and damages. Defense verdict on the grounds that the officer was solely negligent for traveling in the wrong lane of travel without continuous use of his siren.

### C. Construction Defect Litigation

I have handled hundreds of construction defect cases representing both general contractors and subcontractor trades. Framing, plumbing, grading, site concrete, foundational concrete, waterproofing, electrical, dry wall, finish carpenters, landscapers, etc. I have dealt with soils cases, water leaks, explosions, and most every type of expert out there from structural engineers, soils compaction, hydrology and the trade specialties noted above. All of this experience is directly relevant to inverse condemnation cases and/or matters involving city construction, whether in defense or prosecution.